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Individually and on Behalf of All Similarly Situated Individuals

Additional Counsel Listed on Following Pages

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

RAMON GARCIA, an individual;
VICTOR RAMIREZ, an individual;
ADRIAN VALENTE, an
individual; MARIO PINON, an
individual; MYNOR CABRERA,
an individual; Individually, and on
Behalf of All Similarly Situated
Individuals

Plaintiffs,

vs.

MACY'S WEST STORES, INC., an
Ohio corporation; JOSEPH
ELETTO TRANSFER, INC., a
New York corporation; XPO
LOGISTICS, LLC, an Ohio
corporation; and DOES 1 through
25, Inclusive,

Defendants.

Case No: 3:16-cv-04440-WHO

[The Honorable William H. Orrick]

CLASS ACTION

**NOTICE OF MOTION AND MOTION
FOR PRELIMINARY APPROVAL OF
PARTIAL CLASS ACTION
SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: April 5, 2017

Time: 2:00 p.m.

Courtroom: 2 (17th Floor)

[CONCURRENTLY FILED WITH
DECLARATION OF THOMAS W.
FALVEY ISO MOTION FOR
PRELIMINARY APPROVAL;
[PROPOSED] ORDER]

Action Filed: July 1, 2016

Complaint Removed: August 5, 2016

Trial: None currently Scheduled

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7 MARIO PINON, and MYNOR CABRERA,

Individually and on Behalf of All Similarly Situated Individuals

**NOTICE OF MOTION AND MOTION TO ALL PARTIES AND THEIR
ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE that on Wednesday, April 5, 2017, at 2:00 p.m., or as soon thereafter as the matter can be heard in Courtroom 2 of the United States District Courthouse located at 450 Golden Gate Avenue, San Francisco, California 94102, before the Honorable William H. Orrick, Plaintiffs Ramon Garcia, Victor Ramirez, Adrian Valente, Mario Pinon and Mynor Cabrera (“Plaintiffs”) will and hereby do move this Court for an Order Granting Preliminary Approval of Partial Class Action Settlement. Plaintiffs’ Motion is based on this Notice and the accompanying Memorandum of Points and Authorities and exhibits thereto; the Declaration of Thomas W. Falvey and the respective exhibits thereto; the Proposed Order; this Court’s files and records; and any other evidence, briefing, or argument properly before this Court.

Plaintiffs filed this class action lawsuit to address a common occurrence in today’s workplace during a time of high unemployment: the claim by employers that individuals are not employees, but independent contractors. Plaintiffs alleged Defendants Macy’s West Stores, Inc., and Joseph Eletto Transfer (“Defendants” or “Macy’s” or “Eletto”) consistently failed to pay them and their fellow truck drivers and helpers for all hours worked, and that they were not provided meal and rest periods.

Numerous truck drivers and helpers were contacted and verified what Plaintiffs were claiming, namely, that they were not being paid what they were owed, and that they were not being provided with the meal and rest breaks to which they were entitled.

Defendants vehemently denied - and continue to deny - all allegations. Both Macy’s and Eletto claim that all such individuals were properly classified as Independent Contractors.

///

1 This partial class action settlement only covers the period from July 1, 2012
 2 to December 27, 2014. This time frame encompasses the start of the statutory
 3 period of this suit and proceeds until Eletto no longer operated the Macy's
 4 warehouse that is the subject of this action. Defendant XPO Last Mile, Inc. is not a
 5 party to this partial settlement, and the claims against Macy's will remain pending
 6 for period beginning on December 28, 2014, through to the present.

7 Class Counsel reviewed a substantial amount of documents, driver
 8 identification information, pay stubs, and company policies and procedures.

9 The Class Representatives have negotiated a settlement that, if approved by
 10 the Court, will result in a payment of one million five hundred fifty thousand dollars
 11 (\$1,550,000) to these drivers and helpers. The Class Representatives now seek
 12 preliminary approval of this partial class action settlement.

13 The Class Representatives believe the settlement is fair, reasonable, and
 14 adequate. They respectfully request that the Court review the Settlement Agreement
 15 attached as Exhibit "1" to the Declaration of Thomas W. Falvey ("Falvey Dec."),
 16 and enter an order:

- 17 (1) granting preliminary approval of the proposed Settlement;
- 18 (2) conditionally certifying the Class for settlement purposes;
- 19 (3) approving the form, content and method of distribution of the Notice of
 20 Class Action Settlement;
- 21 (4) appoint the Law Offices of Thomas W. Falvey and JML Law, APLC as
 22 Class Counsel;
- 23 (5) appoint plaintiffs Ramon Garcia, Victor Ramirez, Adrian Valente, Mario
 24 Pinon and Mynor Cabrera as class representatives;
- 25 (6) appoint Kurtzman Carson Consultants as Settlement Administrator;
- 26 (7) set a filing deadline for Class Counsel's motion requesting attorneys' fees,
 27 costs, enhancement awards to Plaintiffs, which Plaintiffs respectfully request occur
 28 prior to the deadline for Class Members to file objections; and

1 (8) schedule a hearing regarding Class Counsel's request for attorney's fees
2 and costs, enhancement awards to Plaintiffs, and enhancement awards to Class
3 Members who were deposed, and final approval of the proposed Settlement.

4 Respectfully Submitted,

5
6 Dated: March 1, 2017

LAW OFFICES OF THOMAS W. FALVEY
JML LAW, APLC

8
9 By: /s/ Armand R. Kizirian
ARMAND R. KIZIRIAN
Attorneys for Plaintiffs and Putative Class

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Ramon Garcia, Victor Ramirez, Adrian Valente, Mario Pinon and Mynor Cabrera (“Plaintiffs”) seek preliminary approval of a settlement on behalf of themselves and the Putative Class comprised of all individuals purported to be independent contractors, who now or formerly performed services for Defendants Macy’s West Stores, Inc., and Joseph Eletto Transfer, Inc. (“Defendants” or “Macy’s” or “Eletto”) (Plaintiffs and Defendants together as the “Parties”) as Drivers and/or Helpers, at Macy’s Logistic and Operations Center located at 1208 Whipple Road, Union City, California 94587, at any time from July 1, 2012 to December 27, 2014 (“Putative Class Members”).

Plaintiffs allege that they and other Putative Class Members were misclassified as Independent Contractors while performing services for Defendants, and therefore denied the protections of the California Labor Code. Plaintiffs therefore alleged claims for unpaid wages, minimum wages, overtime pay, interest thereon, wage statement and waiting time penalties, and other equitable relief, as well as reasonable attorneys’ fees and costs.

The main terms of the Settlement are as follows:

a. Defendants Macy’s and Eletto agree to pay one million five hundred and fifty thousand dollars and zero cents (\$1,550,000.00) (“Gross Settlement Amount”) to settle the Action, which shall include attorneys’ fees and costs, the Class Representative Enhancement Awards, and court-approved costs of settlement administration. Defendant Eletto will contribute the full amount of the Gross Settlement Amount.

b. Putative Class Members will receive a portion of the Net Settlement Amount as long as they do not opt out of the Settlement by submitting valid and timely exclusion forms to the Settlement Administrator, as set forth below and as explained in the Notice of Class Action Settlement (“Notice”). Putative Class

Members will also be given the opportunity to submit a Verified Claim Form in order to specify the amount of time they worked for Defendants during the period covered by this settlement.

The Settlement Agreement, including all exhibits, is attached as Exhibit “1” to the Declaration of Thomas W. Falvey in Support of Plaintiffs Motion for Preliminary Approval of Class Action Settlement (“Falvey Dec.”), filed herewith.

II. DEFINITIONS

a. “Action” refers to the state court action filed in the Superior Court of California, County of Alameda, entitled "RAMON GARCIA, an individual, VICTOR RAMIREZ, an individual, ADRIAN VALENTE, an individual, MARIO PINON, an individual, and MYNOR CABRERA, an individual, Individually and on Behalf of All Similarly Situated Individuals, Plaintiffs, v. MACY'S WEST STORES, INC., an Ohio corporation, JOSEPH ELETTO TRANSFER, INC., a New York corporation, XPO LOGISTICS, LLC, an Ohio corporation, and DOES 1 through 25, Inclusive, Defendants," Case Number RG16821800. The Action was removed to federal court by XPO Logistics, LLC on August 5, 2016, Case Number 4:16-cv-04440-YGR. On September 6, 2016, the Action was deemed related to the *Carter v. XPO Logistics, Inc.* (Case Number 16-cv-01231-WHO) case and thereafter was reassigned to the Honorable William H. Orrick.

b. “Class Period” shall mean from July 1, 2012 to December 27, 2014.

c. “Class Representative(s)” shall refer to Plaintiffs Ramon Garcia, Victor Ramirez, Adrian Valente, Mario Pinon, and Mynor Cabrera.

d. “Class Representative Enhancement” shall refer to a payment to the Class Representatives for their services in this Action and as consideration for their general release of all individual claims against Defendants. This payment is subject to Court approval and shall not exceed \$2,000 for each Class Representative.

e. “Court” refers to the United States District Court, Northern District of California, the Honorable William H. Orrick presiding.

1 f. "Defense Counsel" shall refer to Christopher C. McNatt, Megan E.
2 Ross, Andrew J. Butcher, and Adam C. Smedstad of Scopelitis, Garvin, Light,
3 Hanson & Feary, for Defendant Joseph Eletto Transfer, Inc., and David S. Bradshaw
4 and Nathan W. Austin of Jackson Lewis PC and Michael C. Christman of Macy's
5 Law Department for Defendant Macy's West Stores, Inc.

6 g. "Gross Settlement Amount" means the sum of One Million Five
7 Hundred Fifty Thousand dollars and zero cents (\$1,550,000.00) that Defendant
8 Eletto agrees to pay to settle this lawsuit and shall include attorneys' fees and costs
9 (not to exceed 33 1/3% of the Gross Settlement Amount in attorneys' fees and
10 \$20,000 in attorney costs), the amounts distributed to Settlement Class Members
11 from the Net Settlement, the Class Representative Enhancement, and Settlement
12 Administrator Costs. In no event shall more than One Million Five Hundred Fifty
13 Thousand dollars and zero cents (\$1,550,000.00) of the Gross Settlement Amount
14 be paid or owed by Defendant Macy's or Defendant Eletto.

15 h. "Net Settlement Amount" shall be the remainder of the Gross
16 Settlement Amount after deductions for attorneys' fees and costs (not to exceed 33
17 1/3% of the Gross Settlement Amount in attorneys' fees and \$20,000 in costs), the
18 Class Representative Enhancement, and Settlement Administrator Costs. The Net
19 Settlement Amount shall be established by the Settlement Administrator for the
20 benefit of Settlement Class Members and Settlement Class Members shall be paid
21 from the Net Settlement Amount.

22 i. "Notice" shall mean the Notice of Class Action Settlement,
23 substantially in the form attached as Exhibit "A" to the Settlement Agreement,
24 which is itself attached as Exhibit "1" to the Falvey Declaration. The Settlement
25 Administrator will mail the Notice to each Putative Class Member explaining the
26 terms of the Settlement. Exhibit "A" is the notice approved by the Parties and
27 subject to Court approval.

28 ///

j. “Plaintiffs’ Counsel” shall collectively refer to Thomas W. Falvey, Michael H. Boyamian, and Armand R. Kizirian of the Law Offices of Thomas W. Falvey and Joseph M. Lovretovich and David F. Tibor of JML Law, APLC.

k. “Preliminary Approval Date” means the date the Order Granting Preliminary Approval of Proposed Class Action Settlement is signed by the Court.

l. “Putative Class” or “Putative Class Member” are defined as all individuals who performed services as Drivers and/or Helpers delivering Macy's/Bloomingtondale's products and/or furnishings, and associated with Joseph Eletto Transfer, Inc. out of/at the location identified as the Macy's Logistics and Operations distribution center, 1208 Whipple Road, Union City, California 94587 from July 1, 2012 to December 27, 2014.

m. “Settlement” or “Settlement Agreement” shall mean this Joint Stipulation of Class Action Settlement and Release.

n. “Settlement Administrator” shall be a third-party claims administrator agreed upon by the Parties to perform the customary duties of a settlement administrator including, but not limited to, the duties enumerated in this Settlement Agreement.

o. “Settlement Administrator Costs”, as outlined in the Settlement Agreement marked as Exhibit “1” to the Falvey Declaration, shall mean the total of all costs actually incurred by the Settlement Administrator in order to make all payments owed to Settlement Class Members.

p. “Settlement Class Member” shall mean a Putative Class Member who does not timely opt out of the Settlement and shall include the Class Representatives.

III. FACTUAL BACKGROUND AND THE PARTIES’ CONTENTIONS

Macy’s is a well-known department store, doing business in the State of California, a subdivision of Macy’s Inc. of New York. Eletto is a New York corporation registered with the California Secretary of State, and provides logistics

1 services, conducting business with Macy's in the State of California. Defendants
2 had the Putative Class Members perform services for Defendants in delivering
3 furnishings.

4 The putative class consists of approximately 275 individuals who currently or
5 formerly performed services for Defendants during the Class Period and identified
6 as Drivers and/or Helpers. Declaration of Thomas W. Falvey in Support of
7 Plaintiffs' Motion for Preliminary Approval of Class Action Settlement ("Falvey
8 Decl."), ¶ 16. Plaintiffs claim that Drivers and Helpers were not properly paid
9 wages under California law. Defendants maintain that at all times, the Drivers and
10 Helpers utilized by Defendants have been properly paid as independent contractors.

11 **IV. PROCEDURAL BACKGROUND**

12 On July 1, 2016, Plaintiffs filed this case in Alameda County Superior Court
13 on behalf of California residents who are or have been utilized as Drivers and
14 Helpers by Defendants during the period commencing July 1, 2012 through the
15 present. Falvey Decl., ¶ 8.

16 This partial class action settlement only covers the period from July 1, 2012
17 to December 27, 2014. This time frame encompasses the start of the statutory
18 period of this suit and proceeds until Defendant Eletto no longer operated the
19 Macy's warehouse that is the subject of this action. Defendant XPO Last Mile, Inc.
20 is not a party to this partial settlement, and the claims against Defendant Macy's
21 will remain pending for period beginning on December 28, 2014, through to the
22 present. Falvey Decl., ¶ 7; Settlement Agreement, ¶ 1(t).

23 The Complaint states the following causes of action: (1) Unpaid Wages; (2)
24 Failure to Pay Minimum Wage; (3) Failure to Pay Overtime Compensation; (4)
25 Failure to Provide Meal and Rest Periods; (5) Failure to Furnish Accurate Wage and
26 Hour Statements; (6) Waiting Time Penalties; (7) Indemnification; (8) Conversion;
27 and (9) Unfair Competition.

28 ///

1 On August 5, 2016, Defendant XPO removed this case to the United States
2 District Court for the Northern District of California. On September 6, 2016, the
3 case was deemed related to the *Carter v. XPO Logistics, Inc.*, case number
4 3:16-cv-01231-WHO, and reassigned to the Honorable William H. Orrick. On
5 January 3, 2017, *Kramer v. XPO Logistics, Inc.*, case number 3:16-cv-07039-WHO
6 was also deemed to be related to the *Carter* action and this action, and therefore
7 reassigned to the Honorable William H. Orrick. The parties of these three related
8 actions have since been coordinating with each other, to a limited extent, in moving
9 this litigation forward. The three cases, however, remain distinct and have not been
10 consolidated. The two Defendants that are settling with Plaintiffs in this action are
11 not party to either the *Carter* or *Kramer* suits.

12 Plaintiffs' Counsel has conducted a thorough investigation into the relevant
13 facts and legal claims. Plaintiffs' Counsel closely reviewed the data provided by
14 Defendants in advance of mediation to determine the amount of damages potentially
15 available to Putative Class Members. Falvey Decl., ¶¶ 16-24. Class Counsel also
16 contacted and extensively interviewed Putative Class Members.

17 Mediation was conducted with Michael D. Young, Esq. of Judicate West, on
18 October 5, 2016. Counsel for the Parties fully briefed their positions to the
19 mediator. After a full day of extensive arms-length negotiations by and among the
20 Parties, the Parties were able to reach an agreement in principal. After further
21 negotiations, the Parties finalized the terms of the agreement in January 2017.
22 Falvey Decl., ¶ 12.

23 Based on an independent investigation and evaluation, Plaintiffs' Counsel are
24 of the opinion that the Settlement with Defendants for the consideration and on the
25 terms set forth in the Settlement Agreement is fair, reasonable, and adequate, and is
26 in the best interests of the Putative Class Members, in light of all known facts and
27 circumstances, including the risk of significant delay, the risk that if this matter is
28 litigated a Class may not be certified by the Court or that it may later be decertified,

the risk that Defendants will prevail on their defenses, as well as potential appellate issues. Falvey Decl., ¶ 14.

V. TERMS OF THE SETTLEMENT

The complete Settlement Agreement, along with its exhibits, is attached as Exhibit “1” to the Falvey Declaration.

VI. LEGAL ARGUMENT

A. Preliminary Approval of the Settlement is Appropriate.

The dismissal or compromise of a class action requires court approval. Fed. R. Civ. P. 23(e). Approval involves a two-step process in which the Court first determines whether a proposed class action settlement warrants preliminary approval and, if so, directs that notice be sent to proposed class members, reserving closer scrutiny for the final approval hearing. *See Harris v. Vector Mktg. Corp.* (N.D. Cal. 2011) 2011 U.S. Dist. LEXIS 48878, 23-24. Approval of a class action settlement rests in the discretion of the Court, which should ultimately determine whether the settlement is fundamentally fair, adequate, and reasonable to the Class. *See Torrisi v. Tucson Elec. Power Co.* (9th Cir. 1993) 8 F.3d 1370, 1375.

A court should grant preliminary approval of a settlement if it “appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval.” *See In re Tableware Antitrust Litig.* (N.D. Cal. 2007) 484 F.Supp.2d 1078, 1079. Courts should also apply their discretion in light of the judicial policy favoring settlement of complex class action litigation. *See, e.g., Officers for Justice v. CM! Serv. Comtnn of City & Cnty. of San Francisco* (9th Cir. 1982) 688 F.2d 615, 625 (“[I]t must not be overlooked that voluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation. . .”). As discussed below, application of the relevant factors to this case supports preliminary approval.

1 **1. The Settlement is the Product of Informed, Non-Collusive**
 2 **Negotiation.**

3 Adequate discovery and the use of an experienced mediator support the
 4 conclusion that settlement negotiations were informed and non-collusive. *See*
 5 *Villegas v. J.P. Morgan Chase & Co.*, (N.D. Cal. 2012) 2012 U.S. Dist. LEXIS
 6 166704, *1546. Each side has apprised the other of their respective factual
 7 contentions, legal theories and defenses, resulting in extensive arms-length
 8 negotiations taking place among the parties. On October 5, 2016, the Parties
 9 attended a full-day mediation with experienced mediator, Michael D. Young, Esq.
 10 The Parties were able to reach a Settlement that was based upon the mediator's
 11 advice and guidance, and fundamentally based on the course of litigation in the
 12 *Fuentes v. Macy's* action. While a settlement figure was agreed upon by the Parties
 13 on October 5, 2016, negotiations as to the specific terms of the agreement continued
 14 into January 2017. Falvey Decl., ¶¶ 8,12.

15 Here, the Settlement Agreement was reached through arm's-length
 16 negotiations by experienced counsel familiar with the applicable law, class action
 17 litigation, and the facts of this case. The parties engaged in a comprehensive
 18 exchange of information and each conducted an extensive investigation of the
 19 factual allegations involved in this case. Falvey Decl., ¶¶ 12-14, 25-29, 31.

20 **2. The Strength of Plaintiffs' Case and the Risk of Further Litigation**
 21 **Support Preliminary Approval.**

22 Plaintiffs allege that Defendants improperly classified all Drivers and Helpers
 23 as independent contractors, thus exempt from minimum wage, overtime, meal and
 24 rest period laws, and the wider protections of California Labor Code § 1171.
 25 Further litigation carries numerous risks and obstacles for Plaintiffs and Putative
 26 Class Members, as described below. Falvey Decl., ¶ 14.

27 First, Plaintiffs may not be able to certify the Class of Drivers and Helpers
 28 under Rule 23(b). Plaintiffs largely rely on the uniform policy of claiming the
 Putative Class Members to be independent contractors to establish predominance.
 Plaintiffs will also argue that other common issues also predominate, such as

whether the job expectations and degree of control exercised by Defendants upon the Drivers and Helpers are uniform across the Class.

Plaintiffs believe that Drivers and Helpers have strong claims that they were misclassified as independent contractors because they were under the constant supervision and control of Defendants throughout their daily activities, among other things, wearing uniforms depicting them as employees, and being told to inform customers that they were so employed by Defendants. Falvey Decl., ¶ 13.

Even if Plaintiffs can show that Drivers and Helpers were not independent contractors, Defendants can assert numerous defenses regarding liability and damages. For instance, Defendants contend that the owners of the trucks employed Putative Class Members. With regard to Plaintiffs' claims for wage statement and waiting time penalties, both claims are derivative of Plaintiffs' primary wage claims. Thus, Plaintiffs would recover nothing for themselves, or the Class, if the underlying claims are unsuccessful. Falvey Decl., ¶¶ 14-15.

3. The Settlement Falls Within the Range of Possible Approval.

In deciding whether the proposed settlement is adequate and falls within the range of possible approval, "courts primarily consider plaintiffs' expected recovery balanced against the value of the settlement offer", while taking into account the risks of continuing litigation. *See In re Tableware Antitrust Litig.* 484 F.Supp.2d at 1080. Courts should recognize that "the agreement reached normally embodies compromise; in exchange for the saving of cost and elimination of risk, the Parties each gave up something they might have won had they proceeded with litigation." *Officers for Justice* 688 F.2d at 624, (internal quotations and citation omitted). "[I]t is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not *per se* render the settlement inadequate or unfair. Rather, the fairness and the adequacy of the settlement should be assessed relative to risks of pursuing the litigation to judgment." *Villegas*, 2012 -U.S. Dist. LEXIS 166704 at 96 (internal quotations and citations omitted).

1 Here, the Settlement is fair, adequate, and well within the range of possible
2 approval. Without conceding that any adverse rulings would be justified, Plaintiffs
3 recognize the risk of such outcomes as described above. If Defendants were able to
4 prove that Drivers and Helpers are properly classified as independent contractors,
5 then the value of the case would be zero. All of Plaintiffs' claims and damages rely
6 upon this threshold issue. Falvey Decl., ¶¶ 14, 24.

7 If Plaintiffs are able to demonstrate that Drivers and Helpers are not
8 independent contractors, then the value of Plaintiffs' claims depend principally on
9 the number of overtime hours worked by Putative Class Members, the frequency at
10 which meal and rest breaks were missed, and derivative penalties. Plaintiffs'
11 calculate damages as ranging from \$0, if they cannot prevail on the threshold
12 independent contractor vs. employee issue, to above \$11,500,000, if Plaintiffs are
13 able to prevail on all claims. Falvey Decl., ¶¶ 16-24.

14 In order to properly value the claims at issue, however, these figures must be
15 reduced according to the likelihood that Plaintiffs will prevail on their motion for
16 class certification. Moreover, even if class certification is granted, the figures must
17 be further be reduced according to the likelihood that Plaintiffs will ultimately be
18 able to prevail on the merits. As set forth above, for the purposes of settlement
19 only, Plaintiffs acknowledge that this case may face significant hurdles at both the
20 certification and the liability phases of the litigation. Falvey Decl., ¶ 24.

21 Based on the foregoing, the Settlement will result in a fair and reasonable
22 award to Putative Class Members in light of the litigation risks. The net amount to
23 be paid to the Class under the proposed Settlement (after payment of Class
24 Counsel's attorneys' fees and costs, Settlement Administration Costs, and the Class
25 Representative Enhancements), will be at least \$988,333.33. The average Putative
26 Class Member payout under this amount would be approximately \$3,600. Falvey
27 Decl., ¶ 7. Thus, the Settlement avoids the risks of litigation while ensuring that
28 Class Members receive substantial consideration for a release of their claims. Falvey

Decl., ¶¶ 14, 24. The Settlement also affords relief to Putative Class Members who likely would not have filed individual claims. Falvey Decl., ¶ 31.

Under the circumstances, the amount of the settlement is fair, adequate and reasonable. *See Scott v. Bimbo Bakeries USA* (ED. Pa. 2014) No. 2:10cv03154 (ECF No. 174) (approving a settlement of wage and hour claims for payments of \$900 to each current driver and \$450 to each former driver, plus \$12,500 enhancement payments); *Vero v. Aaron Bros.*, (N.D. Cal. 2013) 2013 U.S. Dist. LEXIS 178511 (granting preliminary approval of settlement of wage and hour claims where the average recovery would be between approximately \$28 and \$45); *Bautista v. Harvest Management Sub*, (C.D. Cal. 2013) No. 2:12-cv-10004 (ECF No. 60) (preliminarily approving a \$2.2 million settlement of wage-and-hour violation claims of 14,000-member class).

The plan of allocation is also fair and reasonable. The Settlement provides that the settlement fund shall be allocated based on the number of days Putative Class Members worked during the Class Period, a plan of allocation that is more precise than a weekly allocation method. *See, e.g., Ching v. Siemens Indus.*, (N.D. Cal. 2013) 2013 U.S. Dist. LEXIS 169279, at *19 (granting preliminary approval of settlement and finding that weeks worked was a reasonable basis for allocating individual payments).

4. Plaintiffs' Request for Attorneys' Fees and Costs is Reasonable.

The Settlement provides that, prior to the final approval hearing, Class Counsel may petition the Court for an award of fees in an amount not to exceed \$516,666.66 (33-1/3% of the Settlement Amount) and an award of litigation expenses in an amount not to exceed \$20,000.00. Class Counsel submit that these amounts are fair and reasonable given their investment of time and expense over the last eight months, their contingent fee risk, and the result that they have achieved. The fees that will be requested are based on the amount that will be paid out to the Class, and are within the range of reasonableness established by Ninth Circuit

1 authority. *See, e.g., Knight v. Red Door Salons, Inc.*, (N.D. Cal. 2009) 2009 U.S.
2 Dist. LEXIS 11149, *17 (observing that class action fee awards average around
3 one-third of the recovery) (citations omitted); *see also Vizcaino v. Microsoft Corp.*,
4 290 F.3d 1043, 1048 (2002) (“exceptional results” in “absence of supporting
5 precedents” is relevant to fee determination).

6 Class Counsel have expended significant time litigating this matter, with a
7 risk of no recovery. With their application for fees and costs, Class Counsel will
8 provide the Court with a detailed breakdown of their hours worked and fees
9 incurred for a lodestar cross-check. Many courts have found that an award of one
10 third of the common fund is warranted under certain circumstances. *See, e.g., In re*
11 *Heritage Bond Litig.*, No. 02-ML-1475-DT(RCX), 2005 WL 1594389, at *8-*17
12 (C.D. Cal. June 10, 2005); *Ogbuehi v. Comcast of California/Colorado/Florida/*
13 *Oregon, Inc.*, No. 2:13-CV-00672-KJM, 2015 WL 3622999, at *11-*12 (E.D. Cal.
14 June 9, 2015); *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 492 (E.D.
15 Cal. 2010); *In re Med. X-Ray Film Antitrust Litig.*, No. CV-93-5904, 1998 WL
16 661515, at *6 (E.D.N.Y. Aug. 7, 1998). Class Counsel should be given the
17 opportunity to make such a showing to this Court through their application for fees
18 and costs.

19 Class Counsel shall file their application for fees and costs well in advance of
20 the final approval hearing date, so that Putative Class Members can be fully
21 informed of the fee request and have ample time to consider the request prior to the
22 deadline for objecting and opting out. *See In re Mercury Interactive Securities*
23 *Litigation* (9th Cir. 2010) 618 F.3d 988, 994. The fee motion will be heard at the
24 same time as the final approval motion.

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1 **5. Plaintiffs' Requests for Enhancement Awards Are Reasonable.**

2 Service or incentive awards are typical in class action cases. *Rodriguez v. W.*
 3 *Publ'g Corp.* (9th Cir. 2009) 563 F.3d 948, 958. In evaluating incentive awards,
 4 courts may consider "1) the risk to the class representative in commencing suit, both
 5 financial and otherwise; 2) the notoriety and personal difficulties encountered by the
 6 class representative; 3) the amount of time and effort spent by the class
 7 representative; 4) the duration of the litigation and; 5) the personal benefit (or lack
 8 thereof) enjoyed by the class representative as a result of the litigation." *Van*
 9 *Vranken v. Atlantic Richfield Co.* (N.D. Cal. 1995) 901 F.Supp. 294, 299. Here,
 10 Class Counsel believe that the Class Representative Enhancement award up to the
 11 total amount requested of \$2,000.00 each is consistent with a fair, just and adequate
 12 settlement.

13 Plaintiffs initiated this case and sought counsel to represent the proposed
 14 Class. Plaintiffs met with Class Counsel and provided documentary evidence
 15 relevant to the claims in the case. Falvey Decl., ¶ 8. Plaintiffs also risked their own
 16 professional reputation by suing their, alleged, former employer. Any potential
 17 future employer who searches the internet or runs a background check on Plaintiffs
 18 will discover this fact. In a competitive job market, this factor may weigh heavily
 19 against them. Therefore, Plaintiffs have also undertaken risks with respect to their
 20 future employment prospects. Falvey Decl., ¶ 8.

21 Plaintiffs will provide a supporting declaration at final approval describing
 22 their efforts in this case, the amount of time spent serving the class, and the risks
 23 they incurred.

24 **6. The Settlement Administrator Costs are Reasonable.**

25 Plaintiffs propose appointing Kurtzman Carson Consultants ("KCC") as the
 26 Settlement Administrator in this case. Class Counsel has elected to use KCC from
 27 their review of competitive bids as the Settlement Administrator because it offered a
 28

1 competitive bid and because of positive prior experiences. Falvey Decl., ¶ 30. The
 2 KCC estimate is attached to the Falvey Declaration as Exhibit “2”.

3 The Settlement Administration Costs will be paid from the Gross Settlement
 4 Amount and will not exceed \$15,000.00 absent court approval. Therefore, the
 5 Settlement Administration Costs here are reasonable as compared to the value of the
 6 settlement. Falvey Decl., ¶ 30.

7 **B. The Class Should be Provisionally Certified.**

8 Plaintiffs requests that the Court provisionally certify the Rule 23(b)(3) class
 9 for settlement purposes. The purpose of provisional class certification is to
 10 facilitate distribution to proposed class members of notice of the terms of a
 11 proposed settlement and the date and time of the final approval hearing. *See*
 12 *Manual for Complex Litigation, Fourth* §§ 21.632-33. For purposes of this
 13 Settlement only, Defendants Macy’s and Eletto do not oppose Plaintiffs’ request for
 14 preliminary certification of the Putative Class. Settlement Agreement, ¶ 33(e).

15 **1. Standards Governing Approval of Settlement Classes.**

16 When considering a motion for preliminary approval of a settlement, the
 17 Court must make a threshold determination as to whether the proposed settlement
 18 class meets Rule 23 requirements. *See Hanlon v. Chrysler Corp.* (9th Cir. 1998)
 19 150 F.3d 1011, 1019-20. Specifically, the Court must determine whether the
 20 proposed class satisfies the requirements that (1) the class is so numerous
 21 that joinder would be impracticable; (2) there are questions of law or fact common
 22 to the class; (3) the named plaintiffs’ claims are typical of the claims of the
 23 proposed class; and (4) plaintiffs and their counsel will adequately and fairly
 24 represent the interests of the class. *Id.* at 1019.

25 Additionally, the action must be maintainable under Fed. R. Civ. P. 23(b) (1),
 26 (2), or (3). *Id.* at 1022. Based on these standards, as further discussed below, the
 27 Court should certify the proposed Settlement Class for settlement purposes. The
 28 estimate from KCC provides that the settlement administration costs will equal

1 approximately \$15,000.00, in line with the Settlement Agreement. The final
 2 settlement costs and supporting documentation will be submitted to the Court prior
 3 to the final approval hearing. Falvey Decl., ¶ 7.

4 **2. The Class Satisfies the Requirements of Rule 23(a).**

5 The proposed Class satisfies all requirements of Rule 23(a). First, it is
 6 sufficiently numerous to satisfy Rule 23(a)(1). “While there is no set number of
 7 members required, courts have generally found classes numbering in the hundreds
 8 to be sufficient to satisfy the numerosity requirement.” *Campbell v. Pricewater-*
 9 *houseCoopers* (E.D.Cal. 2008) 253 F.R.D. 586, 594. In this case, the proposed
 10 class consists of approximately 275 Putative Class Members who worked for
 11 Defendants during the Class Period. Falvey Decl., ¶ 16. This will easily satisfy the
 12 numerosity requirement.

13 Second, Rule 23(a)(2) is satisfied because there are questions of law and fact
 14 common to the proposed Class. *See Mazza v. Am. Honda Motor Co., Inc.* (9th Cir.
 15 2012) 666 F.3d 581, 589 (“Commonality only requires a single significant question
 16 of law or fact.”). The showing required to satisfy commonality is minimal. *Hanlon,*
 17 *150 F. 3d at 1020.* The presence of a single common question that will “drive the
 18 resolution of the litigation” is sufficient *Campbell v. PricewaterhouseCoopers, LLP*
 19 (E.D.Cal. 2012) 287 F.R.D. 615, 620. Here, common factual and legal issues
 20 include whether Putative Class Members were all improperly classified independent
 21 contractors, which would and does satisfy the commonality requirement of Rule
 22 23(a)(2). Falvey Decl., ¶ 13.

23 Third, the typicality requirement of Rule 23(a)(3) is satisfied because the
 24 claims raised by Plaintiffs are typical of the claims asserted on behalf of the Class.
 25 Typicality is established if representative claims are “reasonably co-extensive with
 26 those of absent class members; they need not be substantially identical.” *Hanlon,*
 27 *150 F.3d at 1020.* Plaintiffs’ claims arise out of the same factual and legal
 28 circumstances as the claims of Putative Class Members: Like all Putative Class

1 Members, Plaintiffs were unlawfully classified as independent contractors, and
2 regularly worked unpaid overtime hours. Because Defendants' policies and
3 practices were uniform and applied to all Putative Class Members, Plaintiffs' claims
4 against Defendants are typical of those of the Class. Falvey Decl., ¶ 13.

5 Fourth, Plaintiffs' Counsel satisfy the adequacy requirement of Rule 23(a)(4),
6 as well as the requirements of Rule 23(g). Rule 23(a)(4) requires that the Parties
7 fairly and adequately protect the interests of the class. The adequacy requirement is
8 met where the named plaintiffs and their counsel do not have conflicts of interest
9 with other putative class members, and the named plaintiffs and their counsel will
10 vigorously prosecute the interests of the class. *Hanlon*, 150 F.3d at 1020. Here,
11 Plaintiffs and their counsel will more than adequately represent the Putative Class.
12 There are no conflicts and Class Representatives have claims that are in line with
13 those of the Class. Plaintiffs have diligently participated in the litigation by
14 communicating regularly with counsel and providing documents and information
15 about the Class claims. Falvey Decl., ¶ 8.

16 Rule 23(g)(1) requires courts, when appointing class counsel, to consider: (1)
17 the work counsel has done in identifying or investigating potential claims in the
18 action; (2) counsel's experience in handling class actions, other complex litigation
19 and the type of claims asserted in the action; (3) counsel's knowledge of the
20 applicable law; and (4) the resources that counsel will commit to its representation.
21 Here, Class Counsel have investigated and prosecuted the claims; have extensive
22 experience in class action litigation, including wage-and-hour claims, and have been
23 appointed Class Counsel in numerous other cases; and have demonstrated that they
24 have the ability and resources to vigorously pursue the claims. Falvey Decl., ¶¶ 2-6.
25 For these reasons, Plaintiffs' Counsel and Plaintiffs meet the adequacy requirement
26 of Rule 23(a)(4). Plaintiffs' Counsel should be appointed as Class Counsel pursuant
27 to Rule 23(g).

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1 **3. The Class Meets the Requirements of Rule 23(b)(3).**

2 The Putative Class meets the requirements of Rule 23(b)(3) because common
3 questions “predominate over any questions affecting only individual members,” and
4 class resolution is “superior to other available methods for the fair and efficient
5 adjudication of the controversy.”

6 First, the Putative Class satisfies the predominance requirement, which
7 examines whether the proposed classes are “sufficiently cohesive to warrant
8 adjudication by representation.” *Hanlon*, 150 F.3d at 1022. “When common
9 questions present a significant aspect of the case and they can be resolved for all
10 members of the class in a single adjudication, there is clear justification for handling
11 the dispute on a representative rather than on an individual basis.” *Id.* Here,
12 common issues predominate because Plaintiffs’ claims turn on a common liability
13 issue suited to class-wide adjudication: whether or not the Putative Class Members
14 are properly classified as independent contractors under California law, based on the
15 job duties and expectations applicable to all Drivers and Helpers. Whether or not
16 Drivers and Helpers are considered independent contractors under California law is
17 an inherently common question that predominates over any individualized issues.
18 Stemming from this threshold question, liability for Plaintiffs’ state law claims thus
19 depend upon common proof. Falvey Decl., ¶ 13.

20 Second, Rule 23(b)(3) is satisfied because resolution of the issues in this case
21 on a class-wide basis is “superior to other available methods for the fair and
22 efficient adjudication of the controversy.” *See Hanlon*, 150 F.3d at 1023. The
23 alternative to a single class action—numerous individual actions—would be
24 inefficient and unfair. *See, e.g., Custom LED, LLC v. eBay, Inc.*, (N.D. Cal. 2013)
25 2013 U.S. Dist. LEX1S 122022 (superiority established because a “class action
26 would achieve the resolution of the putative class members’ claims at a lower cost
27 and would reduce the likelihood of inconsistent determinations”). Class actions are
28 generally found to be superior where individual claims are relatively small, there is

1 a large volume of individual claims, individuals lack a compelling interest in
 2 controlling their own litigation, and there would be a strain on judicial resources if
 3 individual claims were filed. *See Wang v. Chinese Daily News, Inc.* (C.D. Cal.
 4 2005) 231 F.R.D. 602, 614.

5 **4. Summary of the Terms of the Proposed Settlement** 6 **Agreement and Release of Claims.**

7 The complete details of the Settlement are contained in the Joint Stipulation
 8 of Class Action Settlement and Release, signed by the Parties (Exhibit "1" to the
 9 Falvey Declaration). A summary of the settlement's primary terms follows:

10 **(i) Class Definition**

11 The Class is comprised of all individuals who performed services as Drivers
 12 and/or Helpers delivering Macy's/Bloomingtondale's products and/or furnishings, and
 13 associated with Joseph Eletto Transfer, Inc. out of/at the location identified as the
 14 Macy's Logistics and Operations distribution center, 1208 Whipple Road, Union
 15 City, California 94587 from July 1, 2012 to December 27, 2014.

16 **(ii) Settlement Amount**

17 The Settlement Agreement provides that Defendant Eletto will pay one
 18 million five hundred fifty thousand dollars (\$1,550,000.00) to Plaintiff and the
 19 Putative Class. In exchange, Defendant Eletto will receive a complete release as to
 20 the claims of this suit, and Defendant Macy's will receive a complete release as to
 21 the time period in which Defendant Eletto operated the Macy's Logistics and
 22 Operations distributions center in Union City going back to the start of the class
 23 period, i.e. from July 1, 2012 to December 27, 2014. The total of \$1,550,000.00
 24 shall be inclusive of attorneys' fees and costs, the Class Representative
 25 Enhancements, and settlement administration costs.

26 **(iii) Allocation of Payments and Distribution to Class** 27 **Members**

28 This is not a mandatory claims-made settlement. Putative Class Members
 will receive a portion of the Net Settlement Amount as long as they do not opt out
 of the Settlement by submitting valid and timely exclusion forms to the Settlement

1 Administrator, as set forth below and as explained in the Notice. However, all
2 Putative Class Members will be given the opportunity to submit a Verified Claim
3 Form to specify the number of days they believed they worked within the Class
4 Period, subject to a reasonable adjustment after consultation with the Settlement
5 Administrator and the Parties. Settlement Agreement, ¶ 10(b)(ii), (c)(ii).

6 As Defendants do not admit liability, payments to Putative Class Members
7 from the Net Settlement Amount shall be allocated wholly (100%) as payments for
8 services by non-employees. Correspondingly, the Settlement Administrator will
9 issue Forms 1099-MISC to all Putative Class Members who participate in the
10 Settlement. The Settlement Administrator will calculate the individual settlement
11 awards to eligible Putative Class Members.

12 The Net Settlement Amount will be allocated as 60% for Putative Class
13 Member Drivers, and 40% for Putative Class Member Helpers. Settlement
14 Agreement, ¶ 10(b), (c). In order to calculate each Putative Class Member's share
15 of the settlement, the Settlement Administrator will use the following formulas:

16 The numerator for each Settlement Class Member Driver who returns a
17 Verified Claim Form shall be the total number of days reported by that Settlement
18 Class Member Driver, subject to a possible reasonable adjustment necessarily made
19 after consultation among the Settlement Administrator and counsel for the Parties.
20 The denominator for each Settlement Class Member Driver who returns a Verified
21 Claim Form shall be the total number of days worked by all Settlement Class
22 Member Drivers. The proportionate share of the Driver Net Settlement Amount for
23 each Settlement Class Member Driver who returns a Verified Claim Form shall be
24 that Settlement Class Member Driver's numerator divided by the denominator. The
25 Settlement Administrator will multiply the Driver Net Settlement Amount by the
26 proportionate share of each Settlement Class Member Driver who returns a Verified
27 Claim Form to determine that Settlement Class Member Helper's settlement share.

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1 Defendants records show the number of days worked total by all Settlement
2 Class Drivers. After the days worked figure by Settlement Class Member Drivers
3 who ultimately do submit a Verified Claim Form is accounted for, the remaining
4 days not accounted for will be assigned in equal shares to all Settlement Class
5 Member Drivers who do not submit a Verified Claim Form. As a result, all
6 Settlement Class Member Drivers who do not submit a Verified Claim Form will
7 receive an equal share of remaining funds from the Driver Net Settlement Amount.
8 Settlement Agreement, ¶ 10(b).

9 The numerator for each Settlement Class Member Helper who returns a
10 Verified Claim Form shall be the total number of days reported by that Settlement
11 Class Member Helper, subject to a possible reasonable adjustment necessarily made
12 after consultation among the Settlement Administrator and counsel for Defendants
13 and Plaintiffs. The denominator for each Settlement Class Member Helper who
14 returns a Verified Claim Form shall be the total number of days worked by all
15 Settlement Class Member Drivers. The proportionate share of the Helper Net
16 Settlement Amount for each Settlement Class Member Helper who returns a
17 Verified Claim Form shall be that Settlement Class Member Helper's numerator
18 divided by the denominator. The Settlement Administrator will multiply the Helper
19 Net Settlement Amount by the proportionate share of each Settlement Class
20 Member Helper who returns a Verified Claim Form to determine that Settlement
21 Class Member Helper's settlement share.

22 Defendants records show the number of days worked total by all Settlement
23 Class Helpers. After the days worked figure by Settlement Class Member Helpers
24 who ultimately do submit a Verified Claim Form is accounted for, the remaining
25 days not accounted for will be assigned in equal shares to all Settlement Class
26 Member Helpers who do not submit a Verified Claim Form. As a result, all
27 Settlement Class Member Helpers who do not submit a Verified Claim Form will
28

1 receive an equal share of remaining funds from the Helper Net Settlement Amount.
 2 Settlement Agreement, ¶ 10(c).

3 Checks issued to Settlement Class Members pursuant to this Settlement shall
 4 remain negotiable for a period of one-hundred and eighty (180) days from the date
 5 of mailing. Settlement Class Members who fail to negotiate (i.e., cash or deposit)
 6 their check(s) in a timely fashion shall remain subject to the terms of this
 7 Settlement. After the expiration of one-hundred and eighty (180) days, the sum of
 8 any un-cashed/un-deposited checks shall revert to the Net Settlement Amount and
 9 shall be distributed to the Legal Aid Society – Employment Law Center. Settlement
 10 Agreement, ¶ 10(d).

11 All compensation disputes will be resolved and decided by the Settlement
 12 Administrator after conferring with counsel for the Parties, and the Settlement
 13 Administrator's decision on all compensation disputes will be final and non-
 14 appealable. Settlement Agreement, ¶ 10(e). Under no circumstance will the Gross
 15 Settlement Amount or any portion thereof revert back to Defendants. Settlement
 16 Agreement, ¶¶ 10(d), 11(d).

17 **(iv) Attorneys' Fees, Costs, and Enhancement Fees**

18 Class Counsel may apply for, and Defendants will not oppose, an award of
 19 attorneys' fees in an amount up to one-third (33-1/3%) of the Gross Settlement
 20 Amount (five hundred sixteen thousand six hundred sixty-six dollars and sixty-six
 21 cents (or \$516,666.66)), and costs of up to \$20,000.00, all of which shall be paid
 22 exclusively from the Gross Settlement Amount. In the event that Class Counsel are
 23 not awarded their requested fees and costs, in whole or in part, no non-awarded fees
 24 or costs shall revert to Defendants, instead will revert to the Net Settlement Amount.
 25 Settlement Agreement, ¶ 10(e).

26 The Class Representative Enhancement is in addition to the Plaintiffs'
 27 individual settlement award. In exchange for the Class Representative
 28 Enhancement (up to but not to exceed \$2,000.00 each), the Class Representatives

1 must execute a general release in favor of Defendants. Defendants will not oppose
 2 each Plaintiffs' enhancement petition so long as it does not exceed \$2,000.00. In
 3 the event that the Class Representatives are not awarded the requested \$2,000.00, in
 4 whole or in part, no part of the requested award shall revert to Defendants, but
 5 instead shall revert to the Net Settlement Amount. Settlement Agreement, ¶ 10(e).

6 **(v) Costs of Settlement Administration**

7 The Settlement Administrator shall be entitled to payment, from the Gross
 8 Settlement Amount, for the reasonable costs of administering this settlement. In the
 9 event that the Settlement Administrator's reasonable costs of administering this
 10 settlement exceed \$15,000.00, the Settlement Administrator shall file a declaration
 11 with the Court explaining the basis for the costs above \$15,000.00 and seeking
 12 approval for payment of the additional reasonable costs out of the amount remaining
 13 from the Net Settlement Amount. The Settlement Administrator shall not be paid
 14 for costs above \$15,000.00 absent Court approval. Settlement Agreement, ¶ 12.

15 **(vi) Administration of Notice and Opt-Out Process**

16 This Settlement is not a claims-made settlement. Putative Class Members do
 17 not need to submit claims in order to participate in the Settlement, however,
 18 Putative Class Members will be strongly encouraged to submit a Verified Claim
 19 Form in order to receive a more accurate distribution. The Notice and Verified
 20 Claim Form, attached to the Settlement Agreement as Exhibit "A" and Exhibit "A-
 21 1", shall be sent by the Settlement Administrator to the Putative Class Members, by
 22 first class mail. The Notice shall notify each Putative Class Member of the
 23 pendency of this suit, the nature of the claims, and the fact of partial settlement. In
 24 addition, the Notice will encourage Putative Class Member to submit a Verified
 25 Claim Form, attesting to the number of days they performed work for Defendants
 26 Macy's and Eletto between July 1, 2012 and December 27, 2014. Settlement
 27 Agreement, ¶ 14.

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1 Within seven (7) calendar days of the Preliminary Approval Date, Defendant
 2 Eletto will provide the Settlement Class's identifying information to the Settlement
 3 Administrator. In the event there is missing contact information, the Parties will
 4 make their best efforts to obtain and provide the approximate, last-known
 5 data/information. Within twenty-one (21) calendar days of the Preliminary
 6 Approval Date, the Settlement Administrator will mail the Notice and Verified
 7 Claim Form to the Settlement Class. Settlement Agreement, ¶ 14.

8 Putative Class Members will have forty-five (45) days in which to postmark
 9 objections, disputes, and/or requests for exclusion. The Settlement Administrator
 10 will skip-trace returned mail and re-mail within five days. Under no circumstances
 11 will this extend the period for post-marking objections, disputes, and/or requests for
 12 exclusion claims by more than an additional fifteen (15) days. Settlement
 13 Agreement, ¶ 16. If an envelope so mailed has not been returned within thirty (30)
 14 days of the mailing, it will be presumed that the Putative Class Member received the
 15 Notice. Settlement Agreement, ¶ 17.

16 **(vii) Disputes, Requests for Exclusion and Objections**

17 The Notice shall provide forty-five (45) days from the mailing date of the
 18 Notice for each Putative Class Member to (1) submit a Verified Claim Form; (2) opt
 19 out of the Settlement; or (3) object to the settlement. Settlement Agreement, ¶ 21.

20 As Putative Class Members will not be allocated an initial number of days
 21 worked, but will instead be given an opportunity to submit a Verified Claim Form,
 22 disputes can only arise if the Settlement Administrator and the Parties make a
 23 reasonable adjustment to the figure claimed on a Verified Claim Form. In such a
 24 circumstance, the Settlement Administrator will have the authority to resolve a
 25 dispute stemming from a reasonable adjustment made on the Putative Class
 26 Member's Verified Claim Form. Settlement Agreement, ¶ 15.

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1 Unless otherwise agreed to in writing by counsel for Plaintiffs and
2 Defendants, no opt out request will be accepted if postmarked to the Settlement
3 Administrator more than forty-five (45) calendar days after the date the Notice was
4 mailed to the Putative Class Member. All original opt out requests shall be sent
5 directly to the Settlement Administrator at the address indicated on the Notice and
6 the Settlement Administrator will forward such opt out requests to Class Counsel
7 and Defense Counsel. The Settlement Administrator will certify jointly to Class
8 Counsel and Defense Counsel the number of all Putative Class Members who have
9 submitted opt out requests, objections and/or disputes. During the forty-five (45)
10 day period after the date the Notice is mailed to Putative Class Members, the
11 Settlement Administrator will provide this information beginning on the 15th day
12 after the Notice is mailed, and will update this information every following seven
13 (7) days. Settlement Agreement, ¶ 22.

14 No later than twenty-one (21) calendar days prior to the Final Approval
15 Hearing, the Settlement Administrator will submit a list to Class Counsel and
16 Defense Counsel of all timely, valid opt out requests, disputes and all objections
17 received from Putative Class Members. Settlement Agreement, ¶ 23. Defendants
18 have the option of withdrawing from the settlement if seven percent (7 %) or more
19 of the Putative Class Members opt out of the Settlement. Settlement Agreement, ¶
20 24.

21 Any Putative Class Member wishing to object to the Court's approval of this
22 Settlement shall file any such written objections and/or memorandums of points and
23 authorities in support thereof with the Court and shall serve Class Counsel and
24 Defense Counsel no later than forty-five (45) days from the mailing of the Notice.
25 Settlement Agreement, ¶ 25.

26 A Putative Class Member who has submitted an opt-out request may not
27 submit any objections to the Settlement. Any Putative Class Member who fails to
28 file a timely written objection shall be foreclosed from objecting to this Settlement.

Settlement Agreement, ¶ 25. Class Counsel and Defense Counsel shall file any response to any objections filed by objecting Putative Class Members at least seven (7) calendar days before the Final Approval Hearing. Settlement Agreement, ¶ 26.

(vii) Release of Claims

Upon the Final Approval Date, Putative Class Members who do not timely opt out shall fully release and discharge the Releasees from all claims, whether known or unknown, that were alleged or asserted, or that could have been alleged or asserted based upon the factual allegations set forth in the operative complaint, in the Action, or in which any way arose out of or relate to the services they performed for Defendants Macy's and Eletto at the Macy's Logistics and Operations distribution center, located at 1208 Whipple Road, Union City, California 94587 from July 1, 2012 to December 27, 2014. Settlement Agreement, ¶¶ 29-31.

VII. CONCLUSION

For all of the reasons set forth above, Plaintiffs' respectfully request that this Court certify the proposed class for settlement, and to grant preliminary approval of the partial class action settlement.

Dated: March 1, 2017

LAW OFFICES OF THOMAS W. FALVEY
JML LAW, APLC

By: /s/ Armand R. Kizirian
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